NUTS & BOLTS

Increasing Efficiency in Litigation Through Rule 12(e)

By Craig M. Sandberg

Despite the continued decline in the number of motions for more definite statement,[1] a motion for more definite statement can be an essential tool for litigators. Appropriately used, these motions can significantly reduce the costs associated with litigation. This article seeks to shed light on the purposes and pitfalls to filing Rule 12(e) motions for a more definite statement in federal courts.

Purpose

In general, the federal rules simply require a plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.[2] In practice, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.[3] If, however, a pleading is so vague or ambiguous that a responsive pleading cannot be framed, the responding party need not serve a response but may instead move the court for an order directing the pleader to serve a more definite statement.[4] Although motions for a more definite statement can bring valuable clarity to a pleading, they are only appropriate where a pleading is truly vague or ambiguous. The primary difficulty with such motions is the liberal rules of notice pleading. It is well established that, under the rules of notice pleading, "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[5] Indeed, even the assertion of inconsistent claims does not make the complaint insufficient under either Rule 8 or Rule 12(e).[6]

A Rule 12(e) motion must point out, with specificity, the defects complained of and the details desired. Where a responsive pleading is not required or permitted, a motion under Rule 12(e) for a more definite statement is inappropriate.[7] On a practical note, frequently, a telephone call from one attorney to another can result in a party supplying the necessary detail to file a responsive pleading. Importantly, motions for a more definite statement are viewed with disfavor by the courts and are rarely granted.[8]

One particularly onerous form of elusive pleading is known as the shotgun pleading. A "shotgun" pleading is a pleading in which it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief.[9] Further, prolix, confusing complaints impose unfair burdens on litigants and judges.[10] Therefore, a motion for more definite statement is an appropriate device to narrow the issues and disclose the boundaries of the claim and aid the preparation of any defense.[11]

The decision of whether to file a motion for more definite statement or to undertake discovery should not be taken lightly.

Relationship to Rule 12(b) Motions to Dismiss

At the onset, it is paramount to understand that a motion for more definite statement must not be confused with a motion to dismiss, as the two are not interchangeable. Moreover, there is more than a mere procedural distinction between the two motions. After a plaintiff files a complaint, Rule 12(b) counsels a defendant upon the bases she can properly file a motion to dismiss in lieu of a responsive pleading to the complaint.[12] If, however, a complaint pleads a viable legal theory, but is so unclear that the opposing party cannot respond to the complaint, then a Rule 12(e) motion for more definite statement is proper.[13] Further, when a defendant is unclear about the meaning of a particular allegation in the complaint, the proper course is not to move to dismiss, but rather to move for a more definite statement.[14] Rule 12(e) motions also apply to adversary proceedings in U.S. Bankruptcy Courts.[15]

Additionally, the standards of review are different between Rule 12(b) and 12(e) motions. In considering a motion to dismiss, courts of appeals apply de novo standard of review.[16] In other words, a court of appeals exercises plenary review over a district

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court's order granting a motion for judgment on the pleadings.[17] Practically speaking, the complaint either does or does not state claim upon which relief can be found.

Conversely, a district court's denial of a motion for a more definite statement is reviewed under an abuse of discretion standard.[18] A court of appeals cannot set aside the district judge's decision unless the reviewing court has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.

Rule 12(e) Motion Practice vs. Pretrial Discovery

Since the abolition of bills of particulars in 1946,[19] the federal rules have provided that a party could serve a contention interrogatory on the pleading party or file a motion for a more definite statement whenever she needs more information concerning the claims in a pleading. Similarly, a district judge, on his own initiative, can ask the plaintiff for a brief or memorandum explaining the legal basis of the plaintiff's claim.[20]

The law, however, is clear that Rule 12(e) cannot be invoked to usurp the ordinary channels of pretrial discovery made available by FRCP 26-37.[21] And Rule 12(e) motions are generally disfavored because of their dilatory effect. The preferred course is to encourage the use of discovery procedures to apprise the parties of the factual basis of the claims made in the pleadings.[22] On occasion, a district court may grant a motion for more definite statement with an understanding that a claimant did not have the information necessary to embellish her allegations to comply with a Rule 12(e) motion without obtaining certain information by discovery.[23] Thus, the decision of whether to file a motion for more definite statement or to undertake discovery should not be taken lightly. As such, practitioners must decide whether effective litigation strategy informs against, perhaps, unnecessary motion practice. Nevertheless, just as Rule 12(e) motions are not legitimate substitutes for discovery, discovery is not a fair substitute for proper notice pleading.[24] Factors to consider before filing a motion include the motion's expense, the likelihood of success, and the practical effect in resolving alleged ambiguity.

Strategic Considerations for Rule 12(e) Motions

Once the decision is made to file a motion for more definite statement, counsel must be specific regarding the type of information that he or she seeks through the motion.[25] Counsel must identify the deficiencies in the pleading believed to be objectionable, point out the details he or she desires to have pleaded in a more intelligible form, and assert his or her inability to prepare a responsive pleading.[26] These requirements are designed to enable the district judge to test the propriety of the motion and formulate an appropriate order in the light of its limited purpose of enabling the framing of a responsive pleading.[27]

> Demands for specific information are not only required by the rule, but will force plaintiff to provide additional insights on subjects of interest to defendant and may serve to place material facts in the record that, once pled, could be the basis for a motion to dismiss (such as the applicability of a statute of limitations). At the very least, a motion for more definite statement will provide additional time for the preparation of an answer.[28]

When presented with an appropriate Rule 12(e) motion for a more definite statement, the district court shall grant the motion and demand more specific factual allegations from the plaintiff concerning the conduct underlying the claims for relief.[29] If the pleading party fails to comply with the court's order for more definite statement, the court may then dismiss the case. However, the draconian remedy of dismissal of the action should be invoked only as a last resort and not on the first evidence of inability of an inarticulate plaintiff to satisfy the requirements of the court.[30]

Timing Issues for Rule 12(e) Motions

A motion for more definite statement must be filed before the party serves a response to the pleading claimed to be too vague or ambiguous.[31] In the case of responding to a complaint, the defendant should make a motion for a more definite statement within the time limits prescribed for the answer—within 20 days of service of the summons and complaint, unless extended. While the motion is pending, the time for the defendant to file his or her responsive pleading is implicitly tolled. If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the order, or as scheduled by the court.[32] If the court grants the motion, the plaintiff must replead within 10 days of notice of the order, or as scheduled by the court.[33]

A defendant must make a Rule 12(e) motion for a more definite statement for any Rule 9(b) objection before interposing a responsive pleading or else the motion is waived.[34] Rules 12(g) and 12(h) require the movant to consolidate a Rule 12(e) motion with any of the Rule 12(b) defenses that are available at the time he or she seeks a more definite statement. Thus, lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process will ordinarily be waived if they are not joined with a motion under Rule 12(e).[35] If, however, the complaint is so unclear that the movant legitimately is unable to assert these other defenses at the time a motion is made under Rule 12(e), the movant is unlikely to be penalized for failing to interpose a second motion.[36]

Appealability

A ruling granting or denying a motion for more definite statement is interlocutory. Even if the decision on the motion suggests some unusual circumstances that might make the ruling dispositive and, hence, open for certification and acceptance as an appealable interlocutory order, 28 USCS § 1292(b), the party complaining will have the heavy burden of demonstrating an abuse of the district court's discretion.[37] Thus, one should attempt to appeal from denial of a motion for more definite statement in only the most unusual situations.

Conclusion

While the application of motions for more definite statement falls within a narrow range of situations,[38] such motions can greatly streamline litigation and avoid unnecessary expense. The case law, however, suggests that the movant be careful to seek only such motions in appropriate circumstances, as district courts will hold the movant to the letter, as well as the spirit, of the rule.

Endnotes

1. 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1377 (3d ed. 2004).
2. Conley v. Gibson, 355 U.S. 41, 47 (1957).
3. Scheid v. Fanny Farmer Candy Shops Inc., 859 F.2d 434, 436 (6th Cir. 1988); Conley v. Gibson, 355 U.S. 41, 47 (1957).
4. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 164 (5th Cir. 1999); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987, 992–93 (2003) ("In the rare case where a complaint is too vague to provide a defendant notice to prepare a responsive pleading, Rule 12(e) provides the tool for clarity. However, Rule 12(e) is not intended for routine use or a return to particularization. If more detail is merely desirable (as opposed to necessary for notice purposes), discovery is the answer.") (internal citations omitted).
5. Conley v. Gibson, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2)). *See also* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (reiterating these principles).
6. Business and Commercial Litigation in Federal Courts § 7:36 (Hon. Robert S. Lasnik) (Robert L. Haig ed., West Group & ABA Section of Litigation, 2d ed. 2005).
7. Armstrong v. Snyder, 103 F.R.D. 96, 100 (E.D. Wis. 1984).
8. Cellars v. Pac. Coast Packaging, Inc., 189 F.R.D. 575, 578 (N.D. Cal. 1999).
9. Anderson v. Dist. Bd. of Trustees of Cent. Fl. Cmty. College, 77 F.3d 364, 366–67 (11th Cir. 1996).
10. McHenry v. Renne, 84 F.3d 1172, 1179–80 (9th Cir. 1996).
11. Williams v. United Credit Plan, Inc., 526 F.2d 713, 714 (5th Cir. 1976).
12. Fed. R. Civ. P. 12(b).
13. Humpherys v. Nager, 962 F. Supp. 347, 352–52 (E.D.N.Y. 1997).
14. American Nurses' Ass'n v. State of Ill., 783 F.2d 716, 725 (7th Cir. 1986).
15. Fed. R. Civ. P. 12(e), through Fed. R. Bank. P. 7012(b), is applicable to adversary proceedings. *In re* Rimsat, Ltd., 223 B.R. 345, 346 (Bankr. N.D. Ind. 1998).
16. Olson v. Wexford Clearing Servs. Corp., 397 F.3d 488, 490 (7th Cir. 2005).
17. Corestates Bank, N.A. v. Huls Am., Inc., 176 F.3d 187, 193 (3d Cir. 1999).
18. Hummel v. Wells Petroleum Co., 111 F.2d 883, 886 (7th Cir. 1940).
19. Price v. United States, 335 F.2d 671, 676 (5th Cir. 1964) (discussing amendments to Rule 12(e) abolishing a party's ability to file a motion for a bill of particulars); Montgomery v. Kingsland, 166 F.2d 953, 955 (D.C. Cir. 1948) ("The purpose of a bill of particulars was to furnish the moving party with information needed to enable him to prepare his responsive pleadings and to prepare generally for trial, and a motion therefore should not be used as a forerunner of, or in the nature of a substitute for, a motion to dismiss."); Walling v. W. Va. Pulp & Paper Co., 2 F.R.D. 416, 419 (E.D.S.C. 1942) (discussing the distinction between a bill of particulars and a more definite statement of the allegations of a pleading. "[T]he former is to enable a litigant to obtain from his adversary pertinent details of such adversary's claim or defense as will protect him against surprise and give notice of the real issues tendered, while the latter is to require a pleader to state with definiteness what he first stated vaguely, even if simply and concisely. One is to enable the pleader to prepare for trial, and the other is to inform him definitely what the claim asserted against him is so that he may properly prepare his responsive pleading.").
20. Pratt v. Tarr, 464 F.3d 730, 733 (7th Cir. 2006).
21. FRA S. p. A. v. Surg-O-Flex of Am., Inc., 415 F. Supp. 421, 427 (S.D.N.Y. 1976); Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126, 132 (5th Cir. 1959).
22. Zuppe v. Elite Recovery Servs., Inc., 2006 U.S. Dist. LEXIS 432, at *3 (D. Conn. Jan. 5, 2006) (internal quotes omitted).
23. Dammon v. Folse, 846 F. Supp. 36, 37 (E.D. La. 1994).
24. Eisenach v. Miller-Dwan Med. Ctr., 162 F.R.D. 346, 348 (D. Minn. 1995) ("Any current view that the deficiencies in pleading may be cured through liberalized discovery is at increasingly mounting odds with the public's dissatisfaction with exorbitantly expansive discovery, and the impact that the public outcry has had upon our discovery Rules.").
25. Fed. R. Civ. P. 12(e).
26. 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1378 (3d ed. 2004).
27. Montgomery v. Kingsland, 66 F.2d 953, 956 (D.C. Cir. 1948).
28. Business and Commercial Litigation in Federal Courts § 7:37 (Hon. Robert S. Lasnik) (Robert L. Haig ed., West Group & ABA Section of Litigation, 2d ed. 2005).
29. Thomas v. Independence Twp., 463 F.3d 285, 301 (3d Cir. 2006).
30. Schaedler v. Reading Eagle Pubs., Inc., 370 F.2d 795, 799 (3d Cir. 1967).
31. Fed. R. Civ. P. 12(e) ("before interposing a responsive pleading").
32. Fed. R. Civ. P. 12(a)(4)(A).
33. Fed. R. Civ. P. 12(a)(4)(B) & 12(e).
34. United Nat'l Records, Inc. v. MCA, Inc., 609 F. Supp. 33, 38–39 (N.D. Ill. 1984).
35. Clark v. Associates Comm. Corp., 149 F.R.D. 629, 632 (D. Kan. 1993).
36. Printing Plate Supply Co. v. Curtis Pub. Co., 278 F. Supp. 642, 644–45 (E.D. Pa. 1968).
37. Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126, 131 (5th Cir. 1959).
38. 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1376 (3d ed. 2004).

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